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NO. 82-5444

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SUPREME COURT OF THE UNITED STATES

October Term, 1982

WILLIAM LANAY HARVARD,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITIONER'S SUPPLEMENTAL BRIEF

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Petitioner, WILLIAM LANAY HARVARD, respectfully files this supplemental brief restricted to the intervening circumstance of this Court's granting of certiorari in Barclay v. Florida, certiorari granted on November 8, 1982, Case No. 81-6908, 51 U.S.L.W. 3362. This brief is filed as provided by Rule 22.6 of the Rules of this Court.

DISCUSSION

The case-at-bar squarely presents a federal question that must necessarily be decided by this Court in an intervening case where certiorari has been granted.

This Court recently granted certiorari in a Florida case that is procedurally and substantively similar to the present case and of necessity requires a decision of the question presented herein, Barclay v. Florida, ___ U.S. ___, 51 U.S.L.W.

3362 (1982), certiorari granted November 8, 1982, Case No. 81-6908.

In his petition for writ of certiorari filed in this Court on September 21, 1982, petitioner presented the question regarding the constitutional adequacy of the procedure employed in Florida where there has been a direct violation of Gardner v. Florida, 430 U.S. 349 (1977), Petition for Certiorari [hereafter "Pet."]. Petitioner's case had been remanded to the trial court by the Florida Supreme Court because of the Gardner violation and after reimposition of the death sentence was again appealed to the Florida Supreme Court which again affirmed the sentence. The question is therefore presented as to the propriety of the procedure followed in Florida where the death sentence had been imposed in violation of Gardner. This issue involves the propriety of the procedures utilized in the trial court -- notably the restricted scope of the allowable evidence (Pet. 7-11) -- and the procedures employed by the Supreme Court of Florida in reviewing a death sentence after a Gardner remand -- including the scope and method of review and the presumption of correctness given to the prior Gardner-violative death sentence (Pet. 10-11, 11-13).

Accordingly one of the primary aspects of the question presented in this case involves the adequacy of review by the Supreme Court of Florida after a Gardner-violative death sentence has been reimposed. Specifically petitioner challenges the failure by the Supreme Court of Florida to adequately

review the propriety of aggravating circumstances,^{1/} its refusal to weigh the aggravating and mitigating factors, its refusal to review the propriety of the proceedings before the jury in the capital penalty trial,^{2/} and its refusal to consider the ameliorative and mitigating evidence and argument, in the appeal from the Gardner remand. The lower court's reasoning

1/For example, because it was applying a presumption of correctness of the prior Gardner-violative death sentence, the lower court gave only cursory review of the aggravating factors found by the trial judge. In upholding the aggravating factor of "especially heinous, atrocious, or cruel" the Florida Supreme Court relied primarily upon a fact not found by the trial court in the instant sentencing but which rather had been found in the prior Gardner-violative sentence. (See Pet. at 16). Its application of that aggravating factor was so vague and overbroad so as to violate the Eighth Amendment (Pet. 14-19). Also, in its prior opinion, before the Gardner remand, the court had upheld the sentence on the reasoning that there were no statutory mitigating circumstances, thereby indicating its unconstitutionally restricted view of the permissible scope of mitigating factors, but yet affirmed the reimposed death sentence on the presumption of correctness of that prior sentence. There were serious errors that the court refused to consider in its Gardner review.

2/ There were several fundamental errors in the jury sentencing trial including the failure to allocate the burden of proof or to inform the jury that aggravating circumstances must be proven beyond a reasonable doubt; and the failure to define any of the aggravating factors for the jury, most notably "heinous, atrocious, or cruel" was undefined and unlimited. The Florida Supreme Court refused to review these questions, and this refusal highlights pellucidly the failings of the review in Gardner proceedings. There is a lack of any corrective process in that review and there is no independent or individualized consideration in such a method of review. The Supreme Court of Florida is apparently willing to allow a fundamentally defective death sentence to stand solely for the reason that it is reviewing it in a Gardner appeal. Such reasoning is legally improper, as expressed by the dissenting justices in Dougan v. State, 398 So.2d 439 (Fla. 1981): "The original sentence was vacated. If execution as ordered is to take place, then that execution must be predicated on the last-imposed sentence, which must be free from infirmities. Just because it is the same as a prior affirmed sentence does not necessarily make this one correct; it must pass constitutional muster on its own." Id. at 441.

was that such questions should not be reviewed in a Gardner-remand appeal.

The case of Barclay v. Florida, supra, upon which this Court granted certiorari, is in the identical procedural posture as the present case and of necessity requires resolution of the question presented in this case regarding the adequacy of the Gardner procedure in Florida. However, the instant case presents a more appropriate case than Barclay for review of the Gardner procedure.

The adequacy of the Florida Gardner procedure must necessarily be decided by this Court in Barclay because of the procedural posture in which Barclay reached this Court. Barclay came to this Court after an appeal from a Gardner remand and reimposition of the death sentence. And in such a posture, the Florida Supreme Court expressly refused to reach the question of the propriety of the aggravating or mitigating circumstances. Accordingly, this Court cannot reach the substance of the challenges to the aggravating circumstances (or indeed the issue proposed in respondent's supplemental brief in Barclay)^{3/} unless it first rules that the Florida Supreme Court was in error in refusing to review the application of aggravating circumstances in the Gardner appeal.

While the question or questions upon which certiorari was granted in Barclay are not clear from the pleadings or from this Court's order, it is clear that the issue presented

^{3/}The issue proposed by respondent in Barclay at page 1 of its supplemental brief is:

WHETHER THE FLORIDA SUPREME COURT PROPERLY UPHELD THE IMPOSITION OF THE DEATH PENALTY IN THE FACE OF AN IMPROPER AGGRAVATING CIRCUMSTANCE.

by respondent's supplemental brief is not existent in Barclay except indirectly after the question of the Gardner-remand procedure is resolved.^{4/} Some discussion of the history of Barclay is appropriate. In Barclay, the petitioner challenged none of the aggravating circumstances found in his case on his first appeal to the Florida Supreme Court, Barclay v. State, 343 So.2d 1266 (Fla. 1977). Thereafter, his death sentence was vacated pursuant to Gardner v. Florida, 430 U.S. 349 (1977), and his case was remanded for a limited re-sentencing proceeding before the trial judge only. Barclay v. State, 362 So.2d 657 (Fla. 1978). On appeal from the imposition of his death sentence, Barclay challenged for the first time the finding of three of the four aggravating circumstance in his case, and urged that these errors in assessing aggravating circumstances required that his death sentence be set aside. The Florida Supreme Court, however, refused to entertain

4/Although the issue proposed by respondent's supplemental brief speaks in terms of an "improper aggravating circumstance" (see footnote 3, supra), no aggravating circumstance had been found to be invalid by the lower court in Barclay. Rather, the Florida Supreme Court expressly refused to review the propriety of the aggravating factors of Barclay because it was on review from a Gardner remand. In fact the supplemental brief by respondent in Barclay makes no specific reference to Mr. Barclay's case or the aggravating circumstance that its proposed issue assumes to be invalid. Rather the supplemental brief is the same as respondent filed in a number of cases in this Court. It is not case-specific and does not make clear for this Court the procedural posture of Barclay. The respondent's supplemental brief in Barclay is also somewhat contradictory to its brief in opposition therein where it was argued that since the case below was only on review from a Gardner remand, the issues presented were previously rejected by the lower court and this Court. Respondent's Brief in Opposition in Barclay at 7. Petitioner then went on to argue that there were no erroneous aggravating factors in Barclay's sentence. The issue proposed by respondent in Barclay is plainly not presented by the lower court decision under review and will only be presented if this Court first rules that the Florida Supreme Court should have reviewed the propriety of the aggravating circumstances in its decision below and then secondly finds an aggravating factor to be improperly applied.

this challenge since in its first review of Mr. Barclay's death sentence, 343 So.2d 1266, the court had sustained the findings of aggravating circumstances, 343 So.2d at 1271. The court limited its review to the narrow confines of the Gardner remand:

"Barclay now challenges the imposition of the death sentence, primarily by argument against the findings previously reviewed here and affirmed. We cannot accept counsel's suggestion that we abrogate the 'law of the case.' [Citation omitted.] The dictates of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), have been met, and no defect in the original sentencing order has been identified as stemming from improper material in the PSI. There being no reason to consider matters previously analyzed, we again affirm the trial judge's sentence of death."

Barclay v. State, 411 So.2d 1310, 1311 (Fla. 1982). Thus, the Florida Supreme Court opinion upon which certiorari was granted did not decide the issue apparently presented for certiorari review. That opinion narrowly decided only that "no defect in the original sentencing order has been identified as stemming from improper material in the PSI." Id. And the Court expressly refused to consider the propriety of the aggravating factors.^{5/}

Thus, Barclay presents the unique situation in which the foremost and prerequisite issue that must be decided -- the adequacy of the Florida Supreme Court's review after a Gardner remand --

5/A strong indication that Barclay presents the Gardner question involved in the instant case and of its direct pertinence to this case, is the fact that respondent relies upon the Florida Supreme Court's decision in Barclay to support its position that the Gardner review procedure is adequate. Respondent's Brief in Opposition 5, 6, 9.

has not been raised by any of the parties and has not been briefed, and where the issue proposed as presented in the case was not decided by the lower court's opinion under review.

In contrast to the procedural quagmire of Barclay and the resultant enigmatic nature of the issues, the instant case directly presents the issue of the Florida Gardner procedure in all of its aspects -- the proceedings in the trial court and, pertinent specifically to Barclay, the method of review by the Florida Supreme Court in Gardner remand proceedings.

Accordingly, the instant case presents the appropriate case in which to decide the important question left open in Gardner. And it is a most appropriate question to be decided at this time since this Court has already accepted certiorari in a case where it inevitably must be decided. Since this is both the appropriate case and the appropriate time to consider the significant federal question, this Court should exercise its certiorari jurisdiction to review this case.

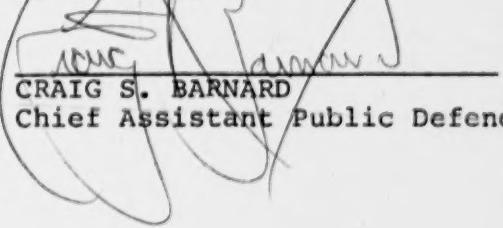
CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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